

MAY 29 1944

CHARLES ELMORE DROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1043

GALLAGHER'S STEAK HOUSE, INC.,
Petitioner,

v.

CHESTER C. BOWLES, Administrator, Office of Price
Administration; TALBOT SMITH, Hearing Adminis-
trator, Office of Price Administration; HARRY B.
CHAMBERS, Hearing Commissioner, Office of Price
Administration, and MITCHELL JELLINE, Chief
Enforcement Attorney, Office of Price Administration,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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No.

GALLAGHER'S STEAK HOUSE, INC.,

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v.

CHESTER C. BOWLES, Administrator, Office of Price Administration; TALBOT SMITH, Hearing Administrator, Office of Price Administration; HARRY B. CHAMBERS, Hearing Commissioner, Office of Price Administration, and MITCHELL JELLINE, Chief Enforcement Attorney, Office of Price Administration,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.**

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Gallagher's Steak House, Inc., a corporation, respectfully presents this petition for Writ of Certiorari to review the mandate of the United States Circuit Court of Appeals for the Second Circuit rendered May 19, 1944, which affirmed an order of the District Court of the United States for the Southern District of New York in favor of respondents and against petitioner. (186-192*)

*Numbers refer to folios in the Transcript of Record.

Summary and Short Statement of Matter Involved.

Petitioner filed a complaint in the District Court of the United States for the Southern District of New York seeking to enjoin the enforcement of a suspension order issued by the Office of Price Administration (hereinafter referred to as OPA). An application was made for a temporary restraining order and for a preliminary injunction. The temporary restraining order (68) was issued, but the application for a preliminary injunction was denied, the temporary restraining order, however, being continued pending appeal (186-192). The order denying the application for the preliminary injunction was affirmed by the United States Circuit Court of Appeals for the Second Circuit, but with consent of respondents execution of the mandate of the Circuit Court has been stayed by order pending the instant application for Writ of Certiorari.

Petitioner operates a restaurant in New York City, with 102 employees, catering to about 500,000 patrons annually, and doing an annual business of more than \$1,000,000. It has conducted its business since May, 1933 under a valuable lease, which expires not until May, 1947 and which contains a ten-year renewal option. Petitioner's additional investment in its business amounts to about \$250,000. It specializes in steaks and is nationally known as a Steak House. *It is therefore not affected by the recent directive of respondent Bowles terminating rationing of meats because steaks and beef roasts are excepted from said directive.*

Pursuant to the regulations of respondents, petitioner filed its initial application for ration points for the use of meats, fats, and oils based upon services of food during the month of December, 1942, the base and it was awarded points sufficient to cover only 8.1% of its December business (73). Through a mistake and a misunderstanding of OPA's complex regulations, petitioner did not

ask in its original application for points for 9,000 food services to employees and 37,476 beverage services to customers to whom was served solely a beverage as distinguished from foods. On an amended application, petitioner was allowed 9,000 employees' service points, but its request for 37,476 points resulted in an allowance of only 7500 points. The full claim for beverage services should have been allowed because under OPA's own interpretation of Ration Order No. 5 (183) petitioner was entitled to have points for the number of persons "served only an alcoholic or non-alcoholic beverage" (183).

Petitioner appealed to the Washington OPA from the allowance of only 7500 beverage points but the determination of the Local War Price & Rationing Board was affirmed on December 7, 1943, the date when petitioner's original application for a temporary injunction was argued in the District Court (89).

While petitioner's appeal from the allowance of the Local War Price & Rationing Board was pending and in reasonable expectation and anticipation of affirmative, fair, and equitable relief from the arbitrary determination of said Rationing Board, petitioner continued its purchases and fell into arrears. In the expectation that it would ultimately receive the same treatment that other restaurants had received (172) and that it would have OPA'S own interpretation applied reasonably and equitably in its favor, petitioner purchased meats without points therefor on the basis of a 37,476 beverage points which should in petitioner's opinion have been allowed and accordingly fell into arrears to the extent of over 200,000 points, having secured meats, etc. on credit between the date of the original issue of ration points April 1, 1943 and June 26, 1943 (75).

On June 26, 1943, OPA filed charges against petitioner based upon the alleged arrearages. As a result of a hear-

ing that took place on September 17, 1943, a suspension order was issued (Exhibit B, Bill of Complaint (42-48).*

It was conceded at the hearing in the District Court that this suspension order would have the effect of putting petitioner out of business (170) because General Ration Order No. 5 in Article 7, Section 7.3 (Issued 2/18/43 effective 2/20/43) FR. 2/19/43)** thereof sets up the means whereby allotments of points are to be granted to restaurants after the initial period. For periods after the initial period (April 1, 1943) it is incumbent upon any restaurant to compare the volume of its business during December, 1942, with the volume during the first two of the three calendar months *preceding a new allotment period*. If the number of persons served during such two month

* The suspension order herein was issued according to Procedural Regulation No. 4, (issued February 13, 1943, effective February 16, 1943, FR March 27, 1943), which set up the procedure for hearing before officials of OPA. The order itself was issued pursuant to General Ration Order No. 8 (issued March 25, 1943, effective April 15, 1943, FR March 27, 1943) providing that anyone who violates a ration order may be prohibited from receiving or from selling, using or otherwise disposing of any rationed commodity. Ration Order No. 16 involving meats, fats and oils (issued March 20, 1943, effective March 29, 1943, 8 FR 6446) provides in Article XXIII for the issuance of a suspension order for violation of said ration order.

All of the aforesaid orders and regulations allegedly stem from Title III of the Second War Powers Act, Section 2(a)2 (56 Stat. 176, 50 U.S.C.A. App. 631 etc.).

The pertinent provisions of the suspension order under review are:

"Therefore, It Is ORDERED, that

(a) Respondent, as an * * * institutional user * * * during this suspension

1. Shall not acquire or receive, directly or indirectly, rationed commodities as defined in Ration Order No. 16.

2. Shall keep posted, plainly visible to the public, at its place of business any notice hereof furnished by the Office of Price Administration.

(b) It is also ORDERED that no person shall in any manner, directly or indirectly, during this suspension, transfer or deliver rationed commodities as defined in Ration Order No. 16 to respondent.

(c) The period of this suspension shall become effective on September 25, 1943 and shall remain in effect so long as respondent shall continue in default for any part of point indebtedness adjudged and until the respondent has given satisfactory proof to the Office of Price Administration that the said point indebtedness has been fully paid" (46-48).

** See Footnote page 13 for text of Ration Order No. 5, Article 7, Section 7.3.

period be less than twice the number served during December, 1942, the allotment is determined by dividing the number of persons served during said two month period by the number served in December, 1942, and multiplying said result by the base for food. Thus, if during December, 1942, this restaurant served 40,000 persons, and during a *subsequent two month period* it served only 20,000 persons, it would be awarded only one half of the allotment for December, and in the case at bar if petitioner be unable to use points for the procuring of food and be compelled by the suspension order to use all allotted points to pay off arrears, petitioner would be unable to secure any food with which to serve its customers. There would thus necessarily follow a complete suspension of ability on the part of petitioner to serve any customers, and if services to customers would thereby be reduced to zero, that would be the base of future allotment of points. If that figure of zero be divided by the number served in December, naturally petitioner would be awarded no points, and if it be awarded no points because business had been reduced to zero as a consequence of the suspension order, it could have no points either to carry on its business with or to pay off its indebtedness. Respondents say in effect "You may pay off your indebtedness by using points for such purpose instead of securing foods. However, if you don't secure foods you cannot serve customers, and if you don't serve customers, you cannot get points." Thus respondents place petitioner in default and keep it there, because as a result of such default it can never secure points with which to clear up such default and bail itself out. *That clearly is why counsel for respondents conceded at the argument that the effect of the suspension order would be to put petitioner out of business* (170).

The effect of the suspension order therefor would mean a destruction of petitioner's substantial business investment and its valuable leasehold. It will as a further consequence be deprived of its liquor license, for under New

York law such license is conditioned upon the sale of food (Alcoholic Beverage Control Law, Section 3, subsection 27, Section 18, subsection 7).

Since the issuance of the suspension order petitioner has not permitted any increase of its arrears but has been equitable in its conduct, keeping its use of points within its allotment (111). If petitioner had been allowed 37,476 points it would have been able to meet all of its obligations.

The District Court in denying the application stated in a memorandum opinion that there was only one question to be determined, and that was the question as to whether or not respondents had the power to issue the suspension order under review (225).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C. 347(a). The mandate of the United States Circuit Court of Appeals for the Second Circuit on which review is sought was entered on May 19th, 1944.

Questions Presented.

1. Did the Congress of the United States confer upon the President of the United States the power and authority to ration foods?

2. Did Congress in conferring any authority for the rationing of foods set up proper standards for the issuance of regulations and orders?

3. Did the President of the United States have authority to delegate to the Office of Price Administration the power conferred upon him by Section (2(a)2 of Title III of the Second War Powers Act?

4. Did OPA have power under any delegation of authority to issue the suspension order herein made?

5. By issuing the suspension order in the form herein under review, have respondents abused the powers granted unto them and have they exceeded the limits of authority granted?

6. Does the power to issue regulations under Section 2(a)2 Title III (a)2 of the Second War Powers Act confer the power to issue the suspension order herein and General Ration Order 5, Article 7, Section 7.3?

7. Are such regulations, ration order, and suspension order reasonable?

8. Is not the combined effect of the suspension order and that of the provisions of General Ration Order 5, Article 7, Section 7.3 upon the petitioner unreasonable and arbitrary?

9. Is the suspension order herein penal in nature?

10. Is the effect of the suspension order herein and General Ration Order 5, Article 7, Section 7.3, separately or together, to take petitioner's property rights without due process of law?

11. Do respondents have authority to direct petitioner to post the notice set forth as Exhibit 1 (R. p. 30) as modified on appeal (R. pp. 103-105).

Reasons for Allowance of Writ.

Petitioner submits the following reasons for allowance of a Writ of Certiorari to review the order of the United States Circuit Court of Appeals for the Second Circuit:

1. The United States Circuit Court of Appeals for the Second Circuit has decided a question of substance relating to the construction and application of a statute of the United States which has not been but should be settled by this Court. This Court decided on May 22, 1944 in *L. P. Steuart & Bro. Inc. v. Bowles*, that OPA has the power under certain circumstances to issue a suspension order, and the questions determined in that case are in part similar to those herein. However that case may be distinguished from the case at bar as follows:

(a) In *Steuart v. Bowles*, the petitioner had committed wilful acts of disobedience which resulted in a suspension order. (*Steuart v. Bowles*,—F (2nd)—). In the case at bar there were no wilful acts. The suspension order herein is arbitrary and unreasonable because being suspended and unable to use points to make purchases pursuant to General Ration Order No. 5, Article 7, Section 7.3, which sets up the method for allotting points to restaurants, petitioner will be denied current allotments since they will be based upon purchases and having been prevented from making purchases it will receive no points and will be unable even to pay off its arrears in points.

(b) In the *Steuart* case Steuart was restricted to selling fuel to certain old customers instead of selling fuel to new customers. Thus its business was merely curtailed. In the case at bar petitioner has been suspended in effect from engaging in any business whatsoever for it has been precluded from securing meats, fats or oils until it has paid off its arrears in points. *The effect of this is concededly to put petitioner out of business* (R. 170). It destroys and takes petitioner's property rights without due process of law.

(c) The *Steuart* case involved rationing of fuel oil, a commodity which the ultimate consumer was authorized to receive *only upon surrendering ration points*. Thus,

when Steuart received fuel oil without points and sold it to its consumers likewise without points, there was a deprivation of some consumers to the benefit of others. Accordingly, the rationing system broke down. In the case at bar, petitioner secured meats without surrendering points, and sold them to the consumer, *who was not required to surrender points*. Consumers had the choice of dining in petitioner's restaurant or of dining elsewhere. The restriction of petitioner by means of the suspension order does not save the commodity, nor does it disturb the ultimate distribution thereof, for, the ultimate consumer can either secure the food from petitioner's restaurant or other restaurants or hotels, lawfully and properly, in accordance with his own choice. Thus, if petitioner be not suspended, the rationing system is not ultimately affected. On the other hand, if the enforcement of the suspension order herein be proper, the only effect is that the petitioner is put out of business and its valuable business and property rights destroyed; yet the consumer can secure the same commodity elsewhere. *Thus the only effect of closing petitioner's place of business is punishment of petitioner for past acts. The determination of the Steuart case does not reach this question of putting a person out of business.*

(d) In the *Steuart* case, there was no question about posting a suspension notice. In the case at bar Judge Chase indicated that he disagreed with the majority of the Court in affirming the requirement that petitioner post a notice that it had been suspended from acquiring foods.

2. The Circuit Court of Appeals for the Second Circuit has decided federal questions that probably conflict with applicable decisions of this Court.

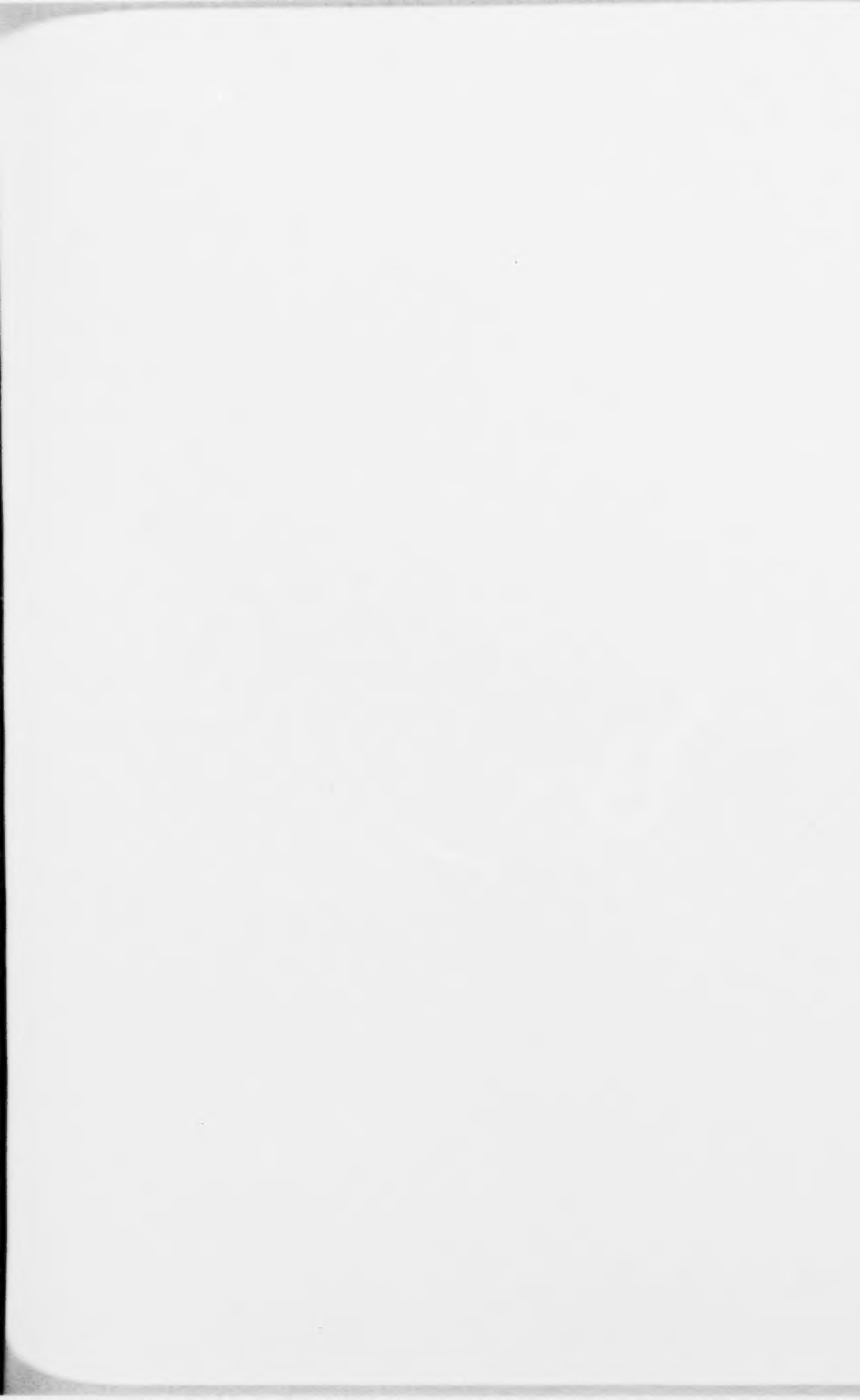
3. The opinion of the Circuit Court of Appeals for the Second Circuit was unanimous in part but in another

part divided. Judge Chase indicated that he dissented from that part of the decision which affirmed the determination of the District Court that respondents properly directed petitioner to post the suspension notice as modified (page 30, Transcript of Record) (~~97-98~~).

93-94

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari issued to the United States Circuit Court of Appeals for the Second Circuit and submits herewith its brief in support of this petition.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No.

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GALLAGHER'S STEAK HOUSE, INC.,

Petitioner,

v.

CHESTER C. BOWLES, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, *et al.*

Respondents.

— 0 0 —

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI TO THE CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.**

A.

The Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet reported but is set forth on Pages 87-98, inclusive, of the Record. The opinion of the District Court is not reported but appears on Pages 74 to 78 of the Record.

B.

Jurisdiction.

I.

The jurisdiction of this Court is sustained by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 347 (a).

II.

The date of the order of mandate to be reviewed is May 18th, 1944 ~~(1944)~~: R 95

III.

The grounds on which jurisdiction of this Court is invoked are set forth in the petition in the reasons for the allowance of the Writ of Certiorari.

IV.

Statement of the Case.

The case has been stated under heading "Summary and Short Statement of Matter Involved" in the Petition.

Summary of Argument.

The opinion of the District Court merely sets forth that there was but one question to be determined; namely, whether the suspension order was valid, and in holding that it was valid Judge Caffey merely stated that there were decisions sustaining such order and other decisions holding the order invalid, and that he approved of the cases sustaining the order (225 to 227). The opinion of the Circuit Court of Appeals merely held that the power to issue the suspension order had been lawfully delegated and had not been exercised arbitrarily.

Petitioner urges that the determination of the Circuit Court of Appeals is fallacious because:

(1) The delegation by Congress to the President of the powers sets forth in Section 2(a)2 of Title III of the Second War Powers Act is unconstitutional.

(2) The suspension order issued by respondents pursuant to Ration Order 8, is unreasonable in its application

to petitioner. The suspension order provides that until petitioner has paid off his arrears in points, it is unauthorized to buy meats, fats or oils. General Ration Order 5, in Article 7, Sec. 7.3* thereof, provides the means whereby allotments of points are to be granted to restaurants after the initial period. Since petitioner may not secure meats, he may not sell them, and if he does not sell them, he does not establish a business base for application for points, and accordingly, he cannot secure points in the future. Thus, OPA has created a regulation which effectually destroys the business of one suspended and seeks to enforce the said regulation in a manner which would prevent petitioner from bailing itself out or even ever being able to repay arrears.

(3) Since the purpose of the suspension order and said rationing regulation is not reasonably connected with

* The pertinent provisions of Sec. 7.3 are as follows:

"Sec. 7.3 *Computation of meal service allotments for Group III users who charge.* (a) If an institutional user charges for meal services and did charge during the month used in determining his base, his allotment of each rationed food for meal services for his establishments in Group III, is determined by comparing his volume of business during December 1942 with his volume during the preceding period.

(b) If the number of persons served meals during the preceding period is less than twice the number of persons he served meals in December 1942, his allotment of a rationed food for meal services is computed in the following way:

(1) The number of persons he served meals during the preceding period is divided by the number he served meals in December 1942;

(2) The figure so obtained is multiplied by his meal service base for that food;

(3) The result is his allotment for meal services.

(c) If the number of persons he served meals and his dollar revenue from meal services during the preceding period are both more than twice his corresponding figures for December 1942, his allotment of a rationed food for meal services is computed in the following way:

(1) The number of persons served meals during the preceding period is divided by the number he served meals in December 1942;

(2) His dollar revenue from meal services during the preceding period is divided by his dollar revenue from meal services in December 1942;

(3) The smaller of the two figures obtained under (1) and (2) above is multiplied by his meal service base for that food;

(4) The result is his allotment for meal services.

(d) In all other cases, his allotment for meal services is twice his meal service base for each rationed food."

the rationing program, its purpose is penal in nature and is beyond the authority granted to respondents.

(4) Although Judge Chase joined in the unanimous affirmance in the Circuit Court of Appeals, he indicated in the opinion that he expressed his disagreement with the majority of the Court as to the propriety of requiring petitioner to post the prescribed notice in the premises. Petitioner urges that such requirement is not reasonably necessary for the allocation of meats, but is one designed solely to punish petitioner in an authorized manner for past acts or omissions.

ARGUMENT.

POINT I.

The delegation by Congress to the President of the powers set forth in Section 2(a)2 of Title III of the Second War Powers Act is unconstitutional.

In *Stewart v. Bowles*, decided by this Court on May 22, 1944, the petitioner had raised no question as to the constitutional authority of Congress to enact Section 2(a)2 of Title III of the Second War Powers Act (56 Stat. 178, 50 U. S. C. App. (Supp. III) Section 633). Petitioner herein urges that said delegation was unconstitutional for it failed to establish clear, definite or sufficient standards to authorize the rules, regulations and ration orders of OPA pursuant to various directives under which OPA acts (*U. S. v. Rock Royal Cooperative*, 307 U. S. 533, 574; *Field v. Clark*, 143 U. S. 649; *Buttfield v. Stranahan*, 192 U. S. 470, 496; *St. Louis Iron Mountain & S. R. Co. v. Taylor*, 210 U. S. 281; *Curran v. Wallace*, 306 U. S. 1, 15; *U. S. v. Grimaud*, 220 U. S. 506; *U. S. v. Butler*, 297 U. S. 1; *U. S. v. Chemical Foundation*, 272 U. S. 1; *Avent v. U. S.*, 266 U. S. 127; *Monongahela Bridge Co. v. U. S.*, 216 U. S. 177).

In *Panama Refining Co. v. Ryan*, 293 U. S. 388, 420, Hughes, C. J., in passing upon this obligation to set up definite criteria in the statute which shall operate as an appropriate standard and guide for executive and administrative action, dealt with this question decisively (pp. 420, 430, 431). There it was said that a general grant of authority to be exercised in "the public good" is insufficient. The cases are reviewed. The Court accepts (p. 426) the distinction made in *Cincinnati W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 88, between

"the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuant of the law".

The Court observes the necessity for establishing "a primary standard" and leaving to the administrator "to fill up the details".

See also *Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co.*, 289 U. S. 266, 279, 285.

That we are at war and presented with extraordinary conditions does not afford a reason to supply an omission or to usurp powers not granted by Congress or exercise those which Congress could not constitutionally grant. (*U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 88.)

The enactment of Section 2(a)2 of Title III of the Second War Powers Act, as construed by OPA, constitutes a delegation of judicial functions to the Executive or to OPA. That it did not intend to do so is shown by Section 2(a)6 which confers jurisdiction upon the District Courts of the United States over violations of Section 2(a)2 or any rule, regulation, or order or subpoena thereunder and to enforce any liability or duty created by or to enjoin any violation of said subsection (a) etc. It is interesting to

note that defendant Smith admitted that the functions of the Hearing Commissioner and Hearing Administrator were judicial (113).

The suspension order under review has the effect of putting petitioner out of business and thus eliminates it as a dealer for reasons not relevant to the rationing program (*Steuart v. Bowles*) and thus deprives petitioner of a property right; namely, the right to do business (*Truax v. Corrigan*, 257 U. S. 312, 329) without due process of law.

The respondents herein have assumed power to create by their own regulations the right to act as prosecutor, judge, appeal bureau, and executioner. None of these powers was envisaged by the Second War Powers Act, Title III, Section 2(a)2. Such exercise of power violates fundamental rights. Petitioner complained of this (28) and Judge Chase, in so far as he differed with his associates in the Circuit Court, apparently was of the opinion that there was some misuse of power in this conference of power upon themselves by the respondents (98). R 94

POINT II.

Respondents have abused the power to issue suspension orders and have exceeded the limits of the authority granted to them. The suspension of petitioner in the form under review is unreasonable and deprives it of property without due process of law.

Petitioner urges herein that respondents lacked the powers to issue a suspension order, a matter not raised in *Steuart v. Bowles*. It further urges that the form of suspension order issued herein is unreasonable insofar as it would compel petitioner to close its doors and does not give petitioner an opportunity to correct a wrong which came about through no wilful act on its part. Thus peti-

tioner has "established that he was eliminated as a dealer or that his quota was cut down for reasons not relevant to allocation * * *" (*Steuart v. Bowles*).

The suspension order forbids petitioner's acquiring meats, fats, and oils until its point indebtedness has been fully paid. The only means whereby it may pay its indebtedness is by using points allotted to it for payment thereof instead of for the purpose of securing additional commodities. However, if it does not secure additional meats, fats, and oils, it cannot sell its product to the consuming public and if it does not sell its product, it can not continue to do any business, and it cannot establish a basis for the acquisition of subsequent allotment of points (the effect of Gen. Ration Order 5, Art. 5, Sec. 7.3). If it does not use its points to secure fats and oils, *it cannot even sell non-rationed meats, because fats and oils are necessary for the preparation of palatable food*. Since it would be unable to secure further allotment of points, it would be unable to continue paying off its indebtedness. Thus, the effect of the suspension order would be to put the petitioner out of business, for it would be unable to secure points to bail itself out. Petitioner is caught between the upper millstone of the suspension order and the destructive effect thereof and the lower millstone of Gen. Ration Order No. 5, Art 5, Sec. 7.3 and its power to deprive petitioner of any points whatsoever either to pay back arrears or purchase supplies and thus its property rights are crushed out of existence. Under these circumstances, petitioner respectfully urges that the suspension order is such that its enforcement would be unreasonable and arbitrary and the deprivation of petitioner's property, without due process of law, because putting the petitioner out of business would be a deprivation of a property right. (*Truax v. Corrigan*, 257 U. S. 312, 329).

POINT III.

The purpose of the suspension order under review is penal in nature and is therefore, beyond the scope of the authority granted to respondents.

In *Steuart v. Bowles*, this Court stated

"We agree that it is for Congress to prescribe the penalties for the laws which it writes * * * Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender."

It is apparent that if the purpose of the suspension order "was relevant to allocation or efficient distribution" (*Steuart v. Bowles*) respondents had the power to issue such order. On the other hand, if its purpose has no relevancy to allocation or efficient distribution "quite different considerations would be presented" (*Steuart v. Bowles*).

The effect of the suspension order under review is different from the effect of such order in the *Steuart* case. There the ultimate consumer cannot properly receive fuel without surrendering points. In the case at bar the ultimate consumer is not required to surrender points when he dines in a restaurant. Thus if it were reasonable to suspend petitioner, he would receive no meats, but the ultimate consumer would not be denied meats for he could dine across the street or elsewhere without any difficulty. If the ultimate consumer in the *Steuart* case could not secure fuel from *Steuart*, he, however, could not secure fuel from the dealer across the street unless such consumer had points.

The use of the suspension order in this case does not affect the rationing system one whit.

The effect of the suspension order under review would not be to carry out the ration program effectively but rather would be to punish petitioner by putting it out of business because of past violations. This power Congress did not intend respondent to have. In *Wallace v. Cutten*, 298 U. S. 229, this Court had before it the Grain Futures Act (42 Stat. 998, 1001). That act provided that if the Secretary of Agriculture had reason to believe that any person is "violating" any provision of the Act or any rules and regulations made pursuant thereto, he might, after service of complaint and hearing, suspend the violator from trading in Contract Markets. The Secretary of Agriculture caused such a complaint to be served on Cutten. The complaint related solely to *previous* violations. The Court there set aside the order and held that the Secretary of Agriculture was without authority to entertain the complaint on the ground that he could not revoke the right to trade in Contract Markets merely because of past violations of the regulations. There again the Court pointed out that the Grain Futures Act contained penalty provisions. Where the express power to grant and revoke the power of trading is given, the legislative grant of power of revocation is, therefore, strictly construed.

Just as in the *Wallace v. Cutten* case, this Court held that the Secretary of Agriculture was without authority to suspend a violator for past acts, so this Court should hold that respondents lacked such power where the sole effect of the suspension is punishment for a past act and is not related to a proper carrying out of the ration program.

POINT IV.

The suspension order improperly requires that petitioner keep posted a notice of suspension at its place of business.

Pursuant to the suspension order, petitioner is required to keep posted at its place of business, until further notice, a notice furnished by respondent, informing the public that petitioner has been prohibited from buying foods as defined in Ration Order No. 16. The requirement that petitioner post said notice is not reasonably necessary for the allocation of commodities, but is designed solely to serve notice upon the public and hold petitioner up to public obloquy. It is like placing petitioner in the stocks. Its apparent purpose, as Judge Chase stated, in his opinion is:

"* * * both to punish the appellant in an unauthorized manner for past acts or omissions and to implement that other part of the order which forbids the public generally to transfer or deliver rationed commodities to the appellant during the time what is called the suspension order is in effect. If it is valid, it subjects the appellant to civil or criminal action in the courts upon its failure to post the notice, whether the appellant uses the ration points it will receive in the future to pay off its point indebtedness and thereafter to acquire additional rationed commodities, or does without them and makes no use of its points at all. Presumably it was intended to subject any person to civil or criminal liability or both, as a statute might, in the event that the person should deliver rationed commodities to the appellant while the order is in effect. * * *" (97) R94

Judge Chase further stated:

"* * * Making its premises a billboard on which the public is warned that deliveries of rationed goods

have been forbidden to it until it has made up what has been called a point deficit and has given the agency satisfactory proof to that effect plays no reasonable and necessary, and therefore lawful, part in allocation *per se*. To make changes in an allocation order which experience has shown necessary to conserve food by allocating it fairly among users is a thing apart from the *public branding* of a user who has incurred the displeasure of the allocating agency. Having made a new order of allocation which restricts the appellant's use of points more than did the original the agency must seek enforcement, if necessary, in the courts and not as complainant, judge, jury and executioner when, and as, it sees fit. Only the power to make allocation orders has been lawfully delegated to this agency. Rules, regulations or orders which go beyond that are not authorized by the statute, which is the source of all the power possessed by the appellees. I would see to it that the order was modified accordingly" (98). R 94

Since the requirement that petitioner post the notice (Record p. 30) as modified (104-105) serves no reasonable purpose connected with the rationing program, the Circuit Court of Appeals erred in its affirmance, and this Court should reverse and direct that a temporary injunction issue pending the trial of the issues.

Conclusion.

The petitioner is entitled to have the judgment reversed, the motion for injunction granted, and an opportunity to present its case upon the merits to the District Court.

Respectfully submitted,

MARK EISNER,
Attorney for Petitioner.

Office - Supreme Court, U. S.
HYLAND

JUN 9 1944

CHARLES ELMORE OWPLEY
CLERK

No. 1048

In the Supreme Court of the United States

OCTOBER TERM, 1943

GALLAGHER STEAK HOUSE, INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 1043

GALLAGHER STEAK HOUSE, INC., PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF
PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The facts of this case are adequately set forth in the opinion of the circuit court of appeals. The principal question involved—that of the validity of suspension orders—has been resolved by this Court's decision in *L. P. Steuart & Bro., Inc., v. Bowles*, No. 793, present Term. The issue of the validity of the Act of Congress conferring the allocation power on the President was not raised by petitioner's complaint and the district court entered no conclusion of law with respect to the matter. The constitutional issue was first presented in petitioner's brief in the circuit court of appeals. The Administrator pointed out in response to this argument that if the constitutional issue had been raised, the single district

judge would have been deprived of jurisdiction under the Act of August 24, 1937, c. 754, § 3, 50 Stat. 752, 28 U. S. C. § 380 (a). Cf. *Wilemon v. Bowles*, No. 854, present Term, certiorari denied, May 22, 1944. The only other issue raised below was whether the allotment of meats, fats, and oils to petitioner by the Office of Price Administration under the formula devised for institutional users of rationed foods was arbitrary. The district court found no basis in the record for a conclusion of arbitrariness and the court of appeals concurred.

There is no basis in fact for a claim, erroneously described as admitted by the Administrator, that the effect of the suspension order would be to put petitioner out of business. Petitioner may continue to sell meats that are ration free, as well as fish and chicken. Almost all fats and oils are likewise ration free and hence may be used by petitioner in cooking. Petitioner's future allotments of ration points are not dependent on the number of customers to whom rationed items are served in a particular period but on the total number of customers served irrespective of the type of purchase. Other "steak houses" which exceeded their ration allotments and overdrew their ration bank accounts, and which were subjected to suspension orders similar to the present one, requiring repayment of past ration indebtedness before additional rationed supplies might be secured, have successfully continued in business. It is therefore feasible for petitioner to

repay its ration indebtedness and establish a basis for future allotments.

It is impossible to follow petitioner's argument that the difference between the suspension order in the *Steuart* case and that in the present case casts doubt on the legality of the latter. In fact the suspension order here involved is of the most moderate and inescapable type in the administration of the allocation power. The suspension order required petitioner to do little more than it was obligated to do under the general Ration Order itself. The Ration Order required surrender of points for meats, fats, and oils and forbade acquisition of any foods covered by the Order until any default was removed.¹ The suspension order in effect restated this provision. In addition petitioner was required by the suspension order to offer proof that its ration-

¹ Ration Order No. 16, 8 Fed. Reg. 6446, providing for the rationing of meats, fats, and oils, was promulgated on March 20, 1943. During the period of violation herein involved, § 10.5 read, in part:

"When points must be given up.—The transferor must get the points from the transferee, and the transferee must give them up, at or before the time when the transfer is made * * *. Where transfer is made by delivery to the transferee (or by shipment by railroad or any other public carrier) the points may be given up later, but not more than seven days after delivery to the transferee. However, a transferee may not accept delivery in this case unless he has points on hand (excluding points not yet surrendered for foods bought or acquired) or in his ration bank account (excluding the amounts of ration checks issued which have not yet been cleared) equal to the point value of the foods transferred. If the transferor does not get the points at or

point indebtedness had been removed, and it was required to post a sign stating that it had been suspended. It is submitted that the latter requirement was a reasonable means of effectuating the suspension order and notifying third parties of its issuance. Petitioner had in the past overdrawn its ration bank account. The posting of the notice of suspension would serve the purpose of informing petitioner's suppliers that it was in default and could not lawfully receive products covered by the Ration Order until the suspension was lifted and the sign removed.

The *Steuart* case disposes of the only issue which would have merited review in the present case. It is therefore submitted that the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator,
Office of Price Administration.

JUNE 1944.

before the time he sends the foods to the transferee, he must, at or before that time, prepare and keep a memorandum showing the name of the transferee, the date he sent the foods, a description of the items, their weight and their point value. If the transferor does not get the points within seven days after delivery, he must immediately notify the district office for the place where the delivery was made, of the default. As long as the transferee is in default, he must not acquire any foods covered by this order, and no transferor who has knowledge of the default may transfer such foods to him."

